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COMMITTEE AGAINST TORTURE

Twenty-third session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 395th MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 10 November 1999, at 10 a.m.

Chairman: Mr. BURNS

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* The summary record of the second part (closed) of the meeting appears as document CAT/C/SR.395/Add.1.

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The meeting was called to order at 10.05 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (agenda item 4) (continued)

Second periodic report of Austria (CAT/C/17/Add.21)

1. At the invitation of the Chairman, the members of the delegation of Austria took places at the Committee table.

2. The CHAIRMAN invited the Austrian delegation to introduce its initial report.

3. Mr. KREID (Austria) said that the elimination of all forms of torture and other cruel, inhuman or degrading treatment or punishment was one of the international community's key commitments in the sphere of human rights. Austria welcomed and encouraged the ongoing process of ratification of the Convention. Having submitted its initial report in 1988, his Government regarded the current report, contained in document CAT/C/17/Add.21, as a consolidation of its second and third periodic reports. It regretted the delays in submission, and was fully committed to improving its reporting mechanisms in future in order to permit a continuous dialogue with the Committee that would take account of recent developments.

4. The report concentrated on legal acts which had far-reaching implications for the legal status of all people living in Austria, namely the Security Police Act of 1991, the Code of Professional Duties introduced in a Guideline Ordinance in 1993, the Criminal Procedure Modification Act of 1993, the Basic Rights Complaints Act of 1993, and the 1997 Aliens Act and Asylum Act. The report also provided information on the selection and training of police officers, the examination procedures used by medical officers, and the activities of the European Committee for the Prevention of Torture (CPT) in relation to Austria.

5. He wished to bring to the Committee's attention a number of recent developments affecting its deliberations. Firstly, the Federal Ministry of the Interior had created the Human Rights Advisory Board to monitor the activities of the security forces with respect to human rights. The Board was empowered to issue recommendations to the Federal Ministry of the Interior and could visit sites of detention. The Board operated independently, and its members included representatives of non-governmental organizations. Secondly, since the submission of its second report Austria had intensified its training for executive officers in the police. Thirdly, a CPT delegation had carried out a 12-day visit to Austria in September 1999, meeting the Federal Ministers of Justice, the Interior, and Labour, Health and Social Affairs, the President of the Human Rights Advisory Board and the Ombudsman, and visiting police stations, jails, prisons and psychiatric establishments. The CPT's report on Austria would be available in 2000.

6. The efforts made by his Government in recent years had led to major improvements. However, it was fully aware of its shortcomings with regard to the Convention's integration into law and its implementation. While a number of the Committee's previous recommendations had been taken into account in the new legislation enacted during the 1990s, several issues raised by the Committee and other bodies such as the CPT were still undergoing further consideration. He

trusted that solutions would be found that satisfied common concerns to the fullest extent possible. The findings and conclusions resulting from the Committee's current session would be carefully examined for their feasibility, with a view to their earliest possible implementation.

7. Mr. SØRENSEN (Country Rapporteur) said that the Committee took note of the delegation's regrets concerning the late submission of Austria's second and third periodic reports, due in 1992 and 1996 respectively. The Committee itself regretted the fact that the consolidated report now before it did not conform to its guidelines. That alone made its evaluation and discussion more difficult. Other complicating factors were that the report did not relate the new legislation it described to specific articles of the Convention, and that, at the time of the initial report the Committee, owing to its inexperience, had not produced clear conclusions and recommendations. Since the point of departure for discussion of the belated second report was thus far from optimal, he would begin by seeking clarification on matters left unresolved 10 years previously at the time of the initial report, contained in document CAT/C/5/Add.10.

8. Firstly, Part I of the initial report stated that both the European Convention on Human Rights and the Convention against Torture were directly enforceable in Austria. However, the former was described as a "constitutional law" while the latter was described as having "the status of a law". What were the practical implications of that distinction?

9. Part II of the initial report stated: "Paragraph 1 [of article 1 of the Convention against Torture] contains a definition of torture and paragraph 2 a provision stating that there may be no derogation from various other legal provisions. Since the Convention against Torture is directly enforceable and since article 1 thus forms part of Austrian law, it has not been necessary to take any measures with a view to its implementation." However, referring to article 2 of the Convention, Part II also stated: "... it should be pointed out that article 3 of the European Convention on Human Rights makes the prohibition against torture a constitutional provision." How was it that torture constituted only a definition under one instrument but a crime under another?

10. Part II of the initial report also maintained that the obligation established in article 4 of the Convention had been taken into account in article 312 of the Austrian Penal Code. However, it was clear from the text reproduced in the report that the article contained no specific reference to any of the four elements crucial to the definition of torture as given in article 1, namely severe physical or mental pain or suffering, intentional infliction, and the fact that the act was perpetrated for a specific purpose and by a public official. The Penal Code thus appeared to lack the specific definition of torture, particularly with regard to the key element of intent, required to make it genuinely enforceable in such cases.

11. The inconsistencies he had mentioned probably made the situation highly confusing for Austrian police (especially the border police), prosecutors and judges. In effect, there was one definition of torture in the Convention, which differed from that according to which torture was forbidden under the European Convention, and the fact remained that the two instruments were accorded different status. Moreover, the domestic Penal Code provided a definition of torture which was not consistent with that given in the Convention against Torture. The Committee's

view was that States parties were not fulfilling their duty under article 4 of the Convention if they did not ensure that their domestic law clearly defined the nature of torture as a criminal offence.

12. In relation to article 5, the initial report adduced a number of articles of the Convention and the Austrian Penal Code to show that universal jurisdiction existed in Austria. However, although that might be true in other fields, it was hard to see how that could apply to torture, since the concept had not been defined in domestic law. A recent and relevant example was the well-known case of Ifsat Ibrahim Elnduri, a native of Iraq. While he was visiting Austria in August 1999, the Austrian authorities had clearly not done their duty under article 6 of the Convention, which required that "any State party in whose territory a person alleged to have committed any offence referred to in article 4 [i.e. torture] is present shall take him into custody or take other legal measures to ensure his presence". In that case, it seemed that the confusion in domestic legislation which he had described earlier had prevented effective action being taken.

13. His first questions on the second periodic report (CAT/C/17/Add.21) related to the Security Police Act (Sicherheitspolizeigesetz, or SPG), described in section I. He took it that the section referred to articles 11, 12 and 16 of the Convention. The Committee welcomed the Act and agreed with the delegation that it represented a significant step forward. However, he was concerned that, through omission, the report gave the impression that the Act was concerned only with the physical, and not the psychological, integrity of human beings where police intervention was concerned. That was doubly unfortunate, as the psychological aspects were more difficult to detect and prove, and in any case it was axiomatic that the Act in question concerned the physical aspects.

14. The Committee welcomed the Guidelines for the intervention of organs of public security, but was concerned that the report did not make clear whether people who found themselves in police custody were automatically accorded their rights under the Guidelines or were obliged to request them. In that connection, the relevant guidelines of the European Committee for the Prevention of Torture provided that a detainee had the right to inform a third party of the fact. He would like to know at what stage of the detention process that occurred in Austria, whether a derogation from that right was possible and who would be responsible, how long a person could be detained under such conditions and whether he had the right of appeal, and finally whether the circumstances were recorded.

15. He welcomed the fact that anyone affected by an act of police intervention in Austria had the right to medical attention and legal protection. Were such detainees always allowed a lawyer of their choice, and could such access be postponed? If so, by whom and for how long? Was it invariably the case that interrogators waited for a lawyer to be present before commencing? Finally, he asked the delegation whether it could produce any statistical evidence to substantiate its assertion that the Security Police Act represented a "big step forward" in practice.

16. Turning to section II of the report, he noted that the new provisions introduced under the Code of Criminal Procedure Modification Act required a renewal of remand decisions within specified time limits. Was there an upper limit for remand, was it the same judge who granted and prolonged remand, and, even more importantly, was it the same judge who then ultimately

pronounced sentence? He would also like to know whether, under the same Act, a judge could order the solitary confinement of a detainee. If so, under what conditions was it done, and how effective was the review process?

17. Paragraph 22 of the report, in section I, mentioned the Security Report to the Austrian Parliament; did "the year under review" in fact refer to 1996? Reportedly there had been 715 complaints about maltreatment by police officers and eight convictions; that made the rate for convictions 0.1 per cent, which appeared rather low. The Committee would like more detail concerning both the offences and the convictions. Since there were so few convictions perhaps all of them could be quoted. Were "disciplinary sanctions" classified separately or included under convictions, and how severe were they?

18. While paragraphs 31 and 35 in section III both dealt with the Asylum Act 1997 and persons making decisions on asylum, paragraph 35 referred to "the Independent Federal Asylum Tribunal", whereas paragraph 31 merely spoke of "a competent authority with expert knowledge". He wanted to know how the decision-makers were selected and how the Government ensured that they had sufficient knowledge about asylum-seekers? That was particularly relevant with regard to torture victims and having an understanding of how they behaved. Many problems that came up under article 3 of the Convention were, in his opinion, due to the decision-makers having insufficient knowledge and experience about torture victims and their behaviour. How did the Government attempt to transmit that vital knowledge?

19. The Committee welcomed the fact that paragraphs 32 and 33 recognized the inadmissibility of returning persons who risked torture, even if they were terrorists or criminals. However, paragraph 34, which mentioned appeal to the European Court, failed to mention the Committee against Torture, which surely had more relevance than the European Court in cases specifically dealing with the risk of torture.

20. He wondered whether a non-criminal asylum-seeker or refugee could be sent to prison or to police premises, not whilst awaiting expulsion but when arriving without papers or refusing to give his or her identity. In such cases, the only "crime" was non-disclosure of identity. Evidently, Austria had asylum centres; but could it theoretically happen that such people were sent to prisons or police stations? The issue was an important one for the perception of asylum, which was problematic worldwide and particularly within the European Union. Public opinion was very important, and if people saw that asylum-seekers were sent to prison they would draw the wrong conclusions: it would send out the signal to the population that asylum-seekers were equated with criminals.

21. The training of police officers was a very relevant issue and the Committee was pleased that Austria did have provision for training; however, article 10 of the Convention stated that "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment." The article was worded strongly: the State party was asked to ensure that both information and education were fully included. Such training was important because not all torture victims behaved in the same way.

22. He welcomed the introduction of a medical certificate, which included history, observations and conclusions. He also thanked Austria for its constant donations over the years to the Voluntary Fund. The respect for torture victims that such support demonstrated was as significant as the financial aid itself. Redress was a vital component of that respect. Article 14 stated that each State party should ensure redress, compensation and as full rehabilitation as possible. Redress was paramount, since acknowledgement by the State that State decisions or State officials were wrong demonstrated the State's ultimate respect for the victim and his or her rights. The General Assembly, on 10 December 1997, had decided that 26 June (the birthday of the Committee) should be a day for remembering torture victims worldwide; he recommended the authorities to join NGOs in commemorating that day, thus further demonstrating their respect for victims of torture.

23. Mr. YAKOVLEV (Alternate Country Rapporteur) endorsed his colleague's esteem for the Austrian Government's position and attitude vis-à-vis the norms of the Convention. However, the Committee did have concerns on several levels. The first concern was whether the law as it stood was adequate, particularly the Code of Criminal Procedure. Another level of concern was the real-life implementation of the law, and the attitudes and actual behaviour of law-enforcement officials. The third level was that of the psychological attitude to ethnic minorities and such issues as the use of racist language, etc.

24. With regard to the presence of a lawyer at the preliminary stages of detention, the Committee had been told that new amendments had been made to the Code of Criminal Procedure. However, it was still not clear whether persons detained by the police had access to a lawyer from the outset of detention. He would be grateful for clarification on that point, since those first stages were the most dangerous and the likeliest time for abuses to occur. Were there any situations where a person could be held incommunicado and thus deprived of consulting a lawyer or asking for the presence of a doctor at the place of detention?

25. The inadmissibility of confessions extracted under the threat of torture or as a result of physical violence was still a problematic issue. Was there a law or clear rule stating that evidence obtained using physical or psychological pressure or other illegal means had to be excluded, was not admissible in court and could not form the grounds for any court decision? Another connected issue was that of instances of first confession, where people were informed by the police that if they did not confess they would be beaten. There had been several such allegations, and he wanted to know whether they were receiving attention and thorough investigation. If the law on inadmissibility was clear and was applied in practice it would constitute an effective barrier to such physical abuse or psychological pressure being used to obtain a confession.

26. What, in practice, was the reaction of the State to allegations of abuse? Did allegations receive an open and rapid investigation, or did abuses occur with impunity? Several instances had been cited where people trying to lodge a complaint had been confronted with counter-complaints lodged by the police claiming that they had resisted arrest, or accusing them of defamation. It was true that the police might at times need to use force to make an arrest and that a criminal might indeed resist, but to what extent was the system open to objective analysis

of the situation? Was there an effective and impartial channel through which such cases could be adjudicated? Or did the police department deal with it within its own confined limits?

27. The Committee was concerned with complex situations, including some which had tragically resulted in dea h. Among the material provided by the Human Rights Committee was information about a young man who had been gagged with tape and who had subsequently suffocated to death; the investigation into that was in progress and the results were not yet available. Those cases, which were undoubtedly known to the Austrian delegation, involved situations where the simple observation of the ruling directives on police behaviour could have provided the necessary safeguards. The Committee had been told that there was a clear rule banning the use of gags by the police because they were dangerous, but some officers appeared to be unaware of the prohibition or at least continued to use them leading sometimes to grave consequences.

28. Despite those ongoing concerns, he felt that the Austrian Government was open to improvement and he hoped that the delegation's fruitful dialogue with the Committee would be helpful in subsequently leading to additional guarantees for the prevention of cruel or inhumane treatment and torture.

29. Mr. CAMARA thanked the Austrian delegation for their report and the extra information given. His first question referred to information given in the document distributed by Amnesty International (October 1999). It listed several cases of maltreatment, including that which had led to the death of the Nigerian citizen Marcus Omofuma, who during his deportation from Austria had suffocated and died. An inquiry had been under way since the event had occurred in May 1999, but after six months there was still no result. He drew the attention of the Government to article 12 of the Convention, which obliged the State party to ensure "a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed". Moreover, since a foreign citizen had been the victim, there might be grounds for judging the torture to be based on discrimination, under article 1 of the Convention. What measures was the Government taking to ensure that such events, violating article 1 of the Convention, did not recur? Had compensation to the family of the deceased been undertaken or planned, pursuant to article 12 of the Convention?

30. Mr. EL MASRY referred the delegation to paragraph 30 of the report, which stated that the expulsion or deportation of foreigners to another country was inadmissible, and that "The only exception to that rule applies where an asylum authority has previously decided on the question of admissibility of deportation". He wondered what would happen if the circumstances changed in the home country of the asylum-seeker or the country to which he was to be deported? Would that constitute another exception? For instance, if there was a coup d'état or change of regime leading to a potentially threatening situation for the applicant, would the decision be reviewed or would the previous decision stand?

31. Paragraph 34 of the report stated that a deportation was "not admissible as long as the European Commission on Human Rights or the European Court of Human Rights had indicated an interim measure". No mention was made of the United Nations Committee against Torture; what was the position if the Committee requested an interim measure?

32. He associated himself with the observations made by his colleague regarding the death of the Nigerian citizen Marcus Omofuma. It was particularly disturbing since it was not the only incident involving a Nigerian citizen; there had also been the case of a Nigerian woman asphyxiated en route to Belgium as a deportee. One of the police officers involved in the case of Mr. Omofuma had stated in court that everyone in their department had known about the practice of using gags. In the light of that incident, he wondered whether Austria had acted on the United Nations Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in December 1979?

33. Lastly, under article 14 of the Convention the victim had a right to obtain redress and compensation, and in the event of death, his dependents were entitled. Had the Austrian Government done anything to ensure compensation in the case of Mr. Omofuma and other similar cases resulting in death during deportation or exposure to torture?

34. Mr. MAVROMMATIS said that the Rapporteur had left few stones unturned. He welcomed the Austrian delegation's report, its additional information and particularly its general attitude to the Committee against Torture. He asked for a succinct description of the procedures followed when a person complained of ill-treatment or torture in police custody. Was a judicial inquiry automatic, or was there only a police inquiry? How was the independence of the inquiry ensured? He had read the reports by the European Committee for the Prevention of Torture and the conclusions of the Human Rights Committee, as well as the Amnesty International document, and wanted to echo the words of the Ambassador, to the effect that the work to stamp out torture could not stop until nothing more remained to be done. Nevertheless, more effective action was undoubtedly needed to eradicate torture and article 16 violations (cruel treatment). The reports pointed to isolated cases of abuse rather than systematic use of torture, but there were still possible improvements, particularly with regard to implementing existing codes and legislation. He wondered whether the text of the Aliens' Act 1997 and the Asylum Act 1997 had been translated into English, and if so whether it would be possible for the Committee to receive copies?

35. Mr. GONZÁLEZ POBLETE said that he had a number of brief observations. Referring to the comments in paragraph 24 of the report on the need to specify time limits when renewing a remand decision, he asked whether such a decision could be overturned in an appeal to a higher court. With regard to paragraph 25, he said that when the Human Rights Committee had considered the report of Austria the previous year, it had noted that detainees were deprived of the possibility of having access to a lawyer before the end of the 72-hour detention period, when they had been arrested at a place outside the jurisdiction of the court having issued the arrest warrant. In his view, legislation should guarantee that such persons could consult a lawyer within that time period. Turning to paragraph 15, which stated that persons must be informed about their rights at their request, he said that such action should be automatic, because detainees usually were unaware that they were entitled to be so informed and did not know what their rights were. Paragraph 16 stated that persons being interrogated should be permitted to sit down wherever possible, but clearly they must always be allowed to do so: forcing detainees to remain on their feet for hours was a well-known practice that constituted psychological torture, as was deprivation of sleep during interrogation, about which the report said nothing. He asked the Austrian delegation to clarify those points.

36. Following its visit to Austria in 1990, the European Committee for the Prevention of Torture (CPT) had reached the conclusion that there was a serious risk of detainees being ill-treated while in police custody, a finding which it had reiterated after another visit in 1994. He asked the Austrian delegation to comment.

37. Mr. YU Mengjia said that, like other members, he sought further information on the specific cases referred to by NGOs and the Special Rapporteur on torture.

38. Mr. SILVA HENRIQUES GASPAR, referring to paragraph 21, asked whether persons could submit a complaint to the Independent Administrative Tribunal for acts which in the eyes of the police were legal but which nevertheless amounted to ill-treatment. Could a complaint lodged with the Independent Administrative Tribunal or with other authorities result in disciplinary measures being taken or a criminal investigation being started?

39. The CHAIRMAN, speaking in his capacity as a member of the Committee, said that he did not fully understand how the requirement to be in possession of a passport at all times was actually applied. Did everyone in Austria always have to carry identity papers, or only non-citizens? Could a foreigner visiting Austria be arrested for not having his passport with him? If so, what was the rationale behind that policy? The tragic case of the Nigerian whose application for asylum had been rejected perhaps reflected indifference and carelessness, rather than deliberate conduct.

40. As to the other cases described in the Amnesty International document dated October 1999, they had a number of common features. They all involved foreigners who were either African or Asian - an ominous sign which suggested that the police might well be targeting persons on the basis of some sort of profile, rather than the facts of each individual situation. Furthermore, in all those cases, the police had used the requirement to be in possession of a passport as an excuse for carrying out the investigation which had led to the confrontation, arrest and subsequent results. Was that a common practice? Did the police employ that method to investigate even when there were no reasonable grounds for doing so? He agreed with Mr. Yakovlev about the use of defamation suits by the police when allegations of ill-treatment were made. The standard practice, and one which the Committee had raised in the past with other countries, was that when allegations of ill-treatment were made, the police officers concerned immediately instituted a defamation complaint, in what was clearly a device to deter the investigation of ill-treatment. In the case involving the three Chinese citizens (the arrest having been made solely because one of the three had not been carrying a passport), they had been jailed and then released the next day without charges; only when they had formally alleged ill-treatment had charges of defamation been brought against them, and they had subsequently been convicted of resisting arrest. Why had they not been charged with that offence prior to their release?

41. The foregoing indicated that there might be a culture of casual violence in some parts of the police force, and he sought the assurance that the Austrian authorities were treating those cases with concern and taking measures to ensure that the police were given appropriate training for dealing with foreigners.

The public part of the meeting rose at 11.25 a.m.